COMMENTS

The Visionary Vine: When Domestic Religious Freedom and International Law Conflict

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I. INTRODUCTION

An old man blows smoke into a cup of thick brown liquid, says a prayer, and passes the cup to the seated circle of believers.[1] The liquid is *hoasca*, a hallucinogenic tea brewed from two indigenous Brazilian plants.[2] What they are doing is illegal in the United States;[3] however it is their religious sacrament.[4] *Hoasca* contains dimethyltryptamine (DMT),

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1. Peter Gorman, *The Visionary Vine*, SANTA FE REP., Jan. 8, 2003, *available at* http://www.sfreprter.com/archive/01-08-03.html.

2. *Hoasca* is the English translation of the Portuguese name, *ayahuasca*. It is made by brewing together two indigenous Brazilian plants: *banisteriopsis caapi* and *psychotria virdis*. The two plants have separate functions: *banisteriopsis caapi* contains beta-carbolines that suppress monoamine oxidase enzymes that would otherwise break the DMT down to where it was not absorbable, and *psychotria virdis* contains the hallucinogen DMT. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1174-75 (10th Cir. 2003).

3. *See* Controlled Substances Act, 21 U.S.C. § 812 (2000).

4. *See O Centro Espirita*, 342 F.3d at 1174-75.

an LSD like substance, which is illegal under the 1971 United Nations Convention on Psychotropic Substances (Convention).[5]

The Convention, enacted in the United States under the Controlled Substances Act (CSA),[6] conflicts with constitutional rights to religious freedom as well as domestic laws emphasizing that right.[7] An example of such a domestic law is the Religious Freedom Restoration Act (RFRA).[8] RFRA sanctions exemptions to domestic laws, and is a valid defense to the CSA.[9] For example, although *hoasca* use is illegal under the CSA, the Tenth Circuit found that RFRA allows *hoasca* use for religious purposes in the United States.[10] The Convention conflicts with RFRA by making it illegal for the United States to import *hoasca* despite any domestic exemptions.[11]

This conflict highlights the problem of enforcing international law when it directly conflicts with domestic law. International law often fails to reflect the value autonomous nations attach to their national legislation.[12] Accordingly, in the United States, the courts uphold individual rights granted by the Constitution over international agreements.[13] The Convention conflicts with the domestic laws of various signatory states in addition to the United States, and signatory states have sought to resolve this conflict when dealing with *hoasca*. Members of the Canadian judiciary have recognized the religious and spiritual significance of psychotropic substances.[14] Brazil legalized

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5. United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (United States entered into force on July 15, 1980) [hereinafter Convention].

6. 21 U.S.C. § 812.

7. *See* Convention, *supra* note 5; U.S. CONST. amend I; Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

8. 42 U.S.C. §§ 2000bb-2000bb-4.

9. *See id.* § 2000bb(b)(2).

10. *See O Centro Espirita*, 342 F.3d at 1187.

11. *See* Convention, *supra* note 5, art. 7(f); 42 U.S.C. §§ 2000bb–2000bb-4.

12. *See generally* Convention, *supra* note 5.

13. Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALBANY L. REV. 1207, 1212 (1998); *see, e.g.*, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (noting that the United States' power to make treaties does not extend "'so far as to authorize what the Constitution forbids'") (internal citations omitted); De Lima v. Bidwell, 182 U.S. 1, 195 (1901) (stating that "a treaty is placed on the same footing, and made of like obligation, with an act of legislation" and is thus, subordinate to the Constitution) (internal citations omitted); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 81 (1996) ("[O]ur courts will apply the Constitution domestically even though such action places the United States in violation of international law at the international level.").

14. *See* Marty Logan, *Ecuadorian Healers Sentenced, Traditional Medicine Spared*, INTER PRESS SERVICE, Apr. 26, 2003, 2003 WL 6915116.

hoasca use.[15] The Netherlands held that a constitutional right to religious freedom overrides laws enacted pursuant to the Convention's mandates.[16]

The United States should follow other signatory states in disregarding the Convention when it conflicts with domestic laws. In allowing *hoasca* use for religious purposes, the Tenth Circuit's holding in *O Centro Espirita* interpreted RFRA in a manner which defends religious freedom against other domestic laws.[17] The Tenth Circuit recognized that the constitutional protection of rights outweighs the compelling governmental interest in maintaining legitimacy in the War on Drugs.[18]

The consequence of such a position, however, is to sacrifice some legitimacy in the United States' War on Drugs. When signatory States do not enforce the Convention, it weakens any remaining political unity regarding the War on Drugs as it is one of three major international treaties controlling drug trafficking.[19] All signatory States are free to either propose an amendment to the Convention or denounce it;[20] neither has happened yet.[21] Disregarding the Convention could gain each member State an examination before the International Narcotics Control Board.[22] Thus, because of its domestic position on *hoasca*, the United States, along with at least three other signatory States, could face a hearing for violating a major international treaty.[23] This puts the War on Drugs in a precarious position.

The War on Drugs illustrates that creating and complying with international law are two separate and distinct endeavors. This Comment asserts that this does not have to be the case. Conflicts between domestic and international law are often irreconcilable, and domestic law often supercedes international law.[24] Absent a harmonious world view on basic

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15. *O Centro Espirita*, 342 F.3d at 1174.

16. *See* Netherlands/Fijneman, District Court, Amsterdam, May 21, 2001, case #NJ13/067455-99, *available at* http://www.drugtext.org/library/legal/ayahuascaverdict.htm.

17. *See O Centro Espirita*, 342 F.3d at 1184.

18. *See id.*

19. Summary of Remarks by Herbert S. Okun, in International Law and Health, *Two Approaches: The World Health Organization's Tobacco Initiative and International Drug Controls*, 94 ASIL 193, 195 (2000) [hereinafter Summary of Remarks by Herbert S. Okun].

20. Convention, *supra* note 5, arts. 29, 30 (stating article 29 concerns denunciation, while article 30 concerns amendments).

21. U.N. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 394-401, U.N. Doc. St/Leg.Ser. E/21, U.N. Sales No. E.03.V3 (2002) [hereinafter MULTILATERAL TREATIES].

22. Convention, *supra* note 5, art. 19(a).

23. *See O Centro Espirita*, 342 F.3d at 1187; Convention, *supra* note 5, art. 19(a).

24. *See generally* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (stating that if there are two possible interpretations of a treaty, the least restrictive of constitutional rights should be chosen); De Lima v. Bidwell, 182 U.S. 1, 195 (1901) (placing treaties on the same level as legislation, under the Constitution).

protections, functional international law does not seem possible. What should drafters of international law take into consideration? Drafters can create international law that allows states to comply with ease. Instead of attempting to harmonize core values, deference for constitutional systems should be inherent in every international law. Instead of limiting the drafters of international law, this forces lawmakers to focus on the main objectives and to keep laws flexible and yet still pertinent.

II. *HOASCA*

Effective international law appears impossible in the face of conflicts between domestic law and the international law.[25] This Comment examines one such conflict, between the religious freedom to participate in a faith that uses *hoasca* and the Convention, which outlaws *hoasca*.[26] *Hoasca* is a hallucinogenic tea brewed from two indigenous Brazilian plants.[27] The name *hoasca* comes from the Quecha language for "vision vine," "vine of the dead," or "vine of the soul."[28] Historians date the presence of *hoasca* in the Amazon River Basin back to pre-Colombian times, and archaeological evidence dates use of the plant to at least 2000 B.C.[29] European explorers intermingled with indigenous populations in South America, and the mixed populations embraced *hoasca*, allowing its use to evolve from shamanic administration to contemporary syncretic religions.[30] Its full spectrum of uses include medicinal healing, divination, and diagnosing.[31] It is also regarded as "a magical pipeline to the supernatural realm."[32]

Hoasca has piqued the interest of the developed world in the last half-century.[33] Richard Spruce first recounted *ayahuasca* use in the Northwest Amazon in 1855.[34] A rubber-tapper who discovered *hoasca*,

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25. *See Asakura*, 265 U.S. at 341; *De Lima*, 182 U.S. at 195.

26. *O Centro Espirita*, 342 F.3d at 1174; Convention, *supra* note 5, art. 19(a).

27. *O Centro Espirita*, 342 F.3d at 1175.

28. *Id.* at 1174. *Hoasca* is also referred to as *caapi* or *yage*. Dennis J. McKenna et al., *The Scientific Investigation of Ayahuasca: A Review of Past and Current Research*, 1 HEFFTER REV. OF PSYCHEDELIC RES. 65 (1998), *available at* http://www.heffter.org/review/chapter10.pdf. It is also sometimes called *natem*, when in the Shuar language indigenous to Ecuador. Logan, *supra* note 14.

29. McKenna et al., *supra* note 28, at 65 (citations omitted).

30. *Id.* (explaining that traditional shamanistic administration of *ayahuasca* is still practiced amongst the indigenous Mestizo populations in Peru, Colombia, and Ecuador).

31. *Id.*

32. *Id.*

33. *See id.* at 73.

34. *Id.* (citing Richard A. Spruce, *On Some Remarkable Narcotics of the Amazon Valley and Orinoco*, 9 OCEAN HIGHWAYS: GEOGRAPHICAL MAGAZINE 184-93 (1873)).

founded the Uniao do Vegetal (UDV), a Brazilian syncretic religion.[35] *Hoasca* gained notoriety in literature through the writings of William Burroughs and Allan Ginsberg in *The Yage Letters*.[36] It became popular in the early 1990s with "spiritual seekers" traveling to the Amazon specifically to try it.[37] Today, it is present at some medicinal healing ceremonies on Native American reservations in Canada.[38] The UDV, Barquena, and Santo Daime religions of Brazil all use *hoasca* for sacramental purposes.[39]

Christianity and indigenous South American beliefs fused to create the UDV religion.[40] To the UDV followers, ceremonial drinking of *hoasca* is a sacrament as well as a link to the divinities and a cure for physical and psychological afflictions.[41] There are approximately 130 UDV members in the United States and approximately 8000 UDV members in Brazil.[42] Worldwide membership "spans a broad socio-economic range and includes many educated, middle-class, urban professionals (including a number of physicians and other health professionals)."[43]

Hoasca may be abused as a recreational drug. Pro-drug web pages such as releasethereality.com and erowid.org discuss the UDV and *hoasca*. The latter, erowid.org, was called the Internet's "encyclopedia of altered states" by CBS News.[44] American courts examine *hoasca* for a variety of reasons: the Tenth Circuit granted a preliminary injunction allowing UDV members to continue *hoasca* use under RFRA;[45] certain transnational companies are seeking patents for Amazonian plants and compounds; and the U.S. Patent and Trademark Office (PTO) rejected a patent for the *ayahuasca* plant after indigenous leaders from nine South American nations petitioned the PTO to reject the biopiracy.[46]

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35. *O Centro Espirita,* 342 F.3d at 1174.

36. McKenna et al., *supra* note 28, at 68 (citing WILLIAM S. BURROUGHS & ALLAN GINSBERG, THE YAGE LETTERS (1963)).

37. Gorman, *supra* note 1.

38. Logan, *supra* note 14.

39. McKenna et al., *supra* note 28, at 65.

40. *O Centro Espirita*, 342 F.3d at 1174.

41. *See id.*

42. *Id.* at 1174-75; McKenna et al., *supra* note 28, at 70.

43. McKenna et al., *supra* note 28, at 65.

44. *Debate on Recreational Drug Web Sites*, CBSNEWS.COM, Jan. 27, 2003, *at* http://www.cbsnews.com/stories/2003/01/27/eveningnews/main538154.shtml.

45. *O Centro Espirita*, 342 F.3d at 1175.

46. Traci L. McClellan, *The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples*, 19 WIS. INT'L L. J. 249, 265-66 (2001); *Brazil: The Amazon Fruit That Lost Its Name to the Japanese*, INTER PRESS SERVICE, May 12, 2003, 2003 WL 6915292.

III. 1971 UNITED NATIONS CONVENTION ON PSYCHOTROPIC SUBSTANCES

The Convention is an international law reflecting a specific worldview on drugs.[47] The first multilateral United Nations treaty on drugs was the International Opium Convention, concluded at the Hague in 1912.[48] The 1971 Convention is one of a series of multilateral United Nations treaties regarding narcotics or psychotropic substances.[49] The latest passed, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, does not replace the 1971 Convention; instead, it supplements and reinforces earlier treaties and adopts the Schedules listing substances from the 1971 Convention, including the drug found in *hoasca*.[50] Taken together, the 1971 Convention ensures that narcotics are available for medicinal and scientific use, and the 1988 Convention polices drug trafficking.[51] International drug laws focus on the effects of narcotics and psychotropic substances on the Western developed world; however, these treaties gain signatures from States whose indigenous population use but do not abuse the very same drugs now outlawed.[52] For example, between fifty-six and seventy percent of Bolivia's population are indigenous, either Quecha or Aymara.[53] These people "have traditionally used the coca leaf since pre-colonial times for a variety of purposes, including religious and cultural

47. *See* Convention, *supra* note 5.

48. *See* International Opium Convention, Jan. 23, 1912, 38 Stat. 1912, 8 U.N.T.S. 187 (United States entered into force Feb. 11, 1915). The Single Convention on Narcotic Drugs in 1961 terminated and replaced this Convention. MULTILATERAL TREATIES, *supra* note 21, at 359.

49. *See, e.g.*, Protocol: Bringing Under International Control Drugs Outside the Scope of the Convention of 13 July 1931 For Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Nov. 19, 1948, 2 U.S.T. 1629, 44 U.N.T.S. 277 (United States entered into force Dec. 1, 1949); Protocol: For Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, June 23, 1953, 14 U.S.T. 10, 456 U.N.T.S. 3 (United States entered into force Mar. 8, 1963); Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151 (United States entered into force Dec. 13, 1964).

50. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, S. TREATY DOC. NO. 101-4; U.N. ECONOMIC AND SOCIAL COUNCIL, U.N. CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, U.N. Doc. E/ConF. 82/15 Corr. 1 and Corr. 2 (pmbl., art. 1(r)(1988)); Convention, *supra* note 5, scheds. I-IV.

51. Summary of Remarks by Herbert S. Okun, *supra* note 19, at 195.

52. *See, e.g.*, Convention, *supra* note 5. Brazil signed the Convention on Feb. 21, 1971. MULTILATERAL TREATIES, *supra* note 21, at 394.

53. Solimar Santos, Comment, *Unintended Consequences of United States' Foreign Drug Policy in Bolivia*, 33 U. MIAMI INTER-AM. L. REV. 127, 130 (2002).

rituals, chewing it after meals as a social event, and using it for tea . . . and for medicinal purposes."[54]

Of the one hundred seventy-three nations party to the Convention, a number of nations made reservations to some of its many provisions.[55] The Convention prohibits a list of psychotropic substances referred to in Schedule I.[56] *Hoasca* contains the Schedule I hallucinogen dimethyl-tryptamine (DMT).[57] Article 7 of the Convention requires that signatory States "prohibit all use except for scientific and very limited medical purposes"[58] of Schedule I drugs, and will "prohibit export and import" of Schedule I drugs "except when both the exporter and importer are the competent authorities or agencies of the exporting and importing country or region."[59] The Convention restricts access to the controlled substances in Schedule I, even for medical or scientific purposes, to either the government or scientific endeavors sanctioned by the government.[60]

Article 21 of the Convention is titled "Action Against the Illicit Traffic" and states that "the Parties shall: (a) make arrangements at the national level for the co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination."[61] The Convention imposes a requirement that the nations not only police psychotropic substances; but that they take "measures for the prevention of abuse of psychotropic substances" like preventative public education and treatment, as well as rehabilitation and social reintegration for psychotropic substance abusers.[62]

Article 32 of the Convention allows for an indigenous reservation:

> A State on whose territory there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make

54. *Id.* at 131.

55. *See* Office of the Legal Advisor Dep't of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003, 429-30 (2003).

56. Convention, *supra* note 5, sched. I.

57. *Id.*; O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1175 (10th cir. 2003).

58. Convention, *supra* note 5, art. 7(a).

59. *Id.* art. 7(f).

60. *Id.* art. 7(a).

61. *Id.* art. 21(a).

62. *Id.* art. 20(1-2).

> reservations concerning these plants, in respect of the provisions of article 7, except for the provisions relating to international trade.[63]

The United States, at the time of signing in 1980, made a reservation for Native American peyote use.[64] Neither the United States nor Brazil has made a reservation for the use of *hoasca*.[65] Even though a State may reserve a Schedule I drug to be used within its borders, article 7 still excludes the substance from import and export.[66] Article 7 allows Schedule I drugs to cross borders only for medical or scientific purposes while under the direct control or with specific approval of the government.[67] This restriction in the language, "on whose territory there are plants growing wild," indicates that indigenous plants cannot cross borders under the Convention.[68]

Article 3 allows a nation to exempt preparations from the cover of the Convention if it finds that the substance is "compounded in such a way that it presents no, or a negligible, risk of abuse and the substance cannot be recovered by readily applicable means in a quantity liable to abuse, so that the preparation does not give rise to a public health and social problem."[69] The Convention defines *hoasca* as a preparation because it is a solution or mixture containing a psychotropic substance.[70] However, it is not a preparation exempted under article 3.[71] Also, article 3 does not allow exempted substances to be excluded for imports and exports, so even if people use a drug legally for religious purposes within the nation it becomes a violation of the Convention upon crossing that nation's borders.[72]

The Convention covers *hoasca*, and this has been a point of controversy.[73] This controversy introduces the conflict between the Convention and constitutional religious freedom. In turn, it highlights the inherent conflict in drafting effective international law.

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63. *Id.* art. 32(4).

64. Jimmy Carter, *A Proclamation to the Convention on Psychotropic Substances*, 32 U.S.T. 543 (1980); MULTILATERAL TREATIES, *supra* note 21, at 399.

65. MULTILATERAL TREATIES, *supra* note 21, at 395-99.

66. Convention, *supra* note 5, art. 7(f).

67. *Id.* art. 7(a).

68. *Id.* art. 32(4).

69. *Id.* art. 3(2).

70. *Id.* art. 1(f); *O Centro Espirita*, 342 F.3d at 1175.

71. MULTILATERAL TREATIES, *supra* note 21, at 395-99.

72. Convention, *supra* note 5, art. 3(3(c)).

73. *Cf. O Centro Espirita*, 342 F.3d at 1175; Convention, *supra* note 5, art. 7, sched. I, *with O Centro Espirita*, 342 F.3d at 1183-84 (stating that even though *hoasca* contains DMT, a banned substance under Schedule I, the Tenth Circuit makes no decision as to whether the Convention covers *hoasca*).

Defenders of *hoasca* use argued that the Convention does not apply at all because *hoasca* is not the same as the illegal Schedule I DMT.[74] In a Netherlands case, defenders of *hoasca* introduced a letter from Herbert Schaepe, Secretary of the Board of the United Nations International Narcotics Control Board, which said: "[n]o plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore[sic] not subject to any articles of the 1971 Convention."[75] In the Tenth Circuit case *O Centro Espirita*, defenders also argued that the 1976 United Nations Commentary on the Convention on Psychotropic Substances makes distinctions between plants containing drugs and the drug itself.[76]

> Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which constitute the active principles contained in them. The inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle. This view is in accordance with the traditional understanding of that question in the field of international drug control.[77]

Critics of the Commentary argued that one single author wrote the Commentary five years after the publication of the Convention.[78] They also emphasized the lack of weight afforded to the Commentary, because interpreting a treaty requires the court to read the text according to its plain and ordinary meaning, as stated in the Convention, absent "extraordinarily strong contrary evidence."[79]

The United States Tenth Circuit Court of Appeals heard an appeal from the government stemming from a lower court's decision that the treaty did not cover *hoasca*; however, the Tenth Circuit declined to decide this issue as it would have been merely an advisory opinion.[80] In the Netherlands case, an Amsterdam court concluded that the Convention

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74. *See* Netherlands/Fijneman, District Court, Amsterdam, May 21, 2001, Case #NJ13/067455-99, *available at* http://www.drugtext.org/library/legal/ayahuascaverdict.htm.

75. *Id.*

76. *O Centro Espirita*, 342 F.3d at 1192 (citing U.N. OFFICE ON DRUGS AND CRIME, COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES at 385, ¶ 5, U.N. Doc. E/CN.7/589, U.N. Sales No. E.76.XI.5 (1971) [hereinafter COMMENTARY ON THE CONVENTION]).

77. COMMENTARY ON THE CONVENTION, *supra* note 76, at 387, ¶ 12.

78. *O Centro Espirita*, 342 F.3d, at 1193 n.6 (Murphy, J., dissenting).

79. *Id.* (citing Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982)).

80. *Id.* at 1183.

covers *hoasca*.[81] Despite Mr. Schaepe's letter from the United Nations Narcotics Control Board, the court found that the Convention controls *ayahuasca* because it is not a simple preparation made out of some plants which have DMT; rather, it is a "blend of infusions of different plants, in which those different plants are necessary in order to achieve the desired effect."[82] For the purposes of this Comment, the Convention covers *hoasca*.

IV. THE CONTROLLED SUBSTANCES ACT

The Convention is not self-executing; it requires implementation through domestic law by the signatory States.[83] In order to implement the mandates of the Convention, the United States passed the Controlled Substances Act (CSA), making it illegal to "manufacture, distribute, dispense, or possess with intent."[84] Parallel to the structure of the Convention, the CSA classifies drugs into Schedules, and under the CSA, DMT is a Schedule I drug with a "high potential for abuse," "no currently accepted medical use in treatment in the United States" and a "lack of accepted safety for use of the drug or other substances under medical supervision."[85] CSA's Schedule I includes preparations,[86] and the steepest criminal punishments are for possession of a Schedule I substance.[87]

The CSA has proven to be airtight when faced with constitutional challenges before the United States Supreme Court. *United States v. Oakland Cannabis Buyers' Cooperative*, decided in 2001, upheld the CSA and rejected an implied medical necessity exception for medical marijuana.[88] Justice Thomas's majority opinion emphasized that statutes create federal crimes, not the common law, and thus statutes, not common law, create defenses to those crimes.[89] However, a religious challenge to the CSA is based on a federal statute, RFRA, and not affected by *Oakland Cannabis*.[90]

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81. Netherlands/Fijneman, District Court, Amsterdam, May 21, 2001, Case #NJ13/067455-99, *available at* http://www.drugtext.org/library/legal/ayahuascaverdict.htm.

82. *Id.*

83. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 101(2), 92 Stat. 3768 (1978).

84. Controlled Substances Act, 21 U.S.C. § 841(a)(1) (2000).

85. *Id.* § 812 (b)(1)(A-C).

86. *Id.* § 812(c), sched. I(c).

87. *Id.* § 812(b)(1-5).

88. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 495 (2001).

89. *Id.* at 490.

90. *See* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

V. THE RELIGIOUS FREEDOM RESTORATION ACT

RFRA is a valid defense to domestic law, and once *hoasca* users in the United States can prove the requisite elements required under RFRA, they are exempted from the CSAs prohibition of DMT.[91] However, RFRA still conflicts with the Convention. Congress intended RFRA to "provide a claim or defense to persons whose religious exercise is substantially burdened by government."[92]

Religious freedom is a constitutional right.[93] The First Amendment decrees, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[94] Known collectively as the Establishment Clause and the Free Exercise Clause, this has not been interpreted literally by the Supreme Court.[95] As a result of the Court's refusal to interpret it literally, Congress passed RFRA, requiring the Court to apply strict scrutiny to laws that burden religion.[96] Stated more clearly, RFRA is a product of a Congressional-Supreme Court conflict stemming from their interpretations of the First Amendment.[97]

The Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* recognized religion as occupying two distinct fields: beliefs and acts.[98] To the Court, the Free Exercise Clause recognizes an individual's right to believe whatever he or she desires, but it does not grant the power to act contrary to a generally applicable law.[99] In *Smith*, the Court followed their precedent of generally applicable laws compelling activity forbidden by religion[100] and claimed that any previous decisions upholding the right to disobey generally applicable laws involved the Free Exercise Clause plus another

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91. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1185 (10th Cir. 2003).

92. 42 U.S.C. § 2000bb(b)(2).

93. U.S. CONST. amend. I.

94. *Id.*

95. *See* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877-78 (1990).

96. 42 U.S.C. § 2000bb(a)(4) (stating that "in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion").

97. *See id.*

98. *Smith*, 494 U.S. at 877.

99. *See id.* at 878-80.

100. *See* United States v. Lee, 455 U.S. 252, 256-61 (1982) (holding that an Amish employer is not exempt from collection and payment of Social Security taxes); Gillette v. United States, 401 U.S. 437, 461-62 (1971) (holding that Selective Service does not violate religious freedom); Braunfield v. Brown, 366 U.S. 599, 603-07 (1961) (holding that Sunday-closing laws do not burden non-Christian religions); Prince v. Massachusetts, 321 U.S. 158, 169-71 (1944) (holding that a mother cannot use children to dispense literature in streets under child labor laws).

constitutional protection.[101] *Smith* used the acts-beliefs distinction, although previously rejected by earlier decisions, now differentiated because those decisions addressed hybrid claims.[102] Hybrid claims involve both a Free Exercise claim and an additional constitutional concern.[103] In *Church of Lukumi Babalu Aye v. City of Hialeah* the Court decided that laws which are both neutral and generally applicable are legal.[104] If a law is neither neutral nor generally applicable, it is not legal even though a compelling governmental interest exists with proof that the law was narrowly tailored to advance that particular interest.[105]

In reaction to the Supreme Court's *Smith* decision, Congress passed RFRA.[106] RFRA provides:

> (a) In general Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.
> (c) Judicial relief
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.[107]

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101. *See* Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972) (holding that compulsory school laws invalid when applied to Amish parents); Follett v. McCormick, 321 U.S. 573, 576-78 (1944) (holding that under freedom of speech, flat license to tax should not be applied to street evangelist because tax was not applied to church preacher); Murdock v. Pennsylvania, 319 U.S. 105, 108-17 (1943) (holding that under freedom of speech, flat tax on solicitation invalid when applied to distributing religious ideas); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (holding that under freedom of speech, licensing system invalid when administrator had discretionary powers to deny a license to nonreligious causes); Pierce v. Soc'y of Sisters, 268 U.S. 510, 529-35 (1925) (holding that Compulsory Education Act unreasonably interferes with rights of parents to direct their children's education).

102. Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."); *Yoder*, 406 U.S. at 220 ("[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.").

103. *Smith*, 494 U.S. at 882.

104. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531-32 (1993).

105. *Id.*

106. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

107. *Id.* § 2000bb-1(a-c).

The compelling interest test holds that the government may only interfere with the religious acts of an individual if that interference is in furtherance of a compelling governmental interest and done in the least restrictive means.[108]

A prima facie claim or defense against the federal government under RFRA must prove "(1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion."[109] The strict requirements of the RFRA test remedy the danger of using religion as an excuse for legalizing drug use.[110] The substantial burden imposed by the government must be contrary to the actual requirements of a religion.[111] An example of its proper application is in the Ninth Circuit case *United States v. Bauer*, which held that Rastafarianism does not require its members to distribute marijuana or possess it with the intent to distribute.[112] Likewise, the Ninth Circuit held that Rastafarianism does not require its members to import marijuana.[113] However, it should be noted that the Ninth Circuit allows Rastafarians to raise a claim under RFRA for simple marijuana possession charges.[114] This is in direct contrast with the First Circuit's holding in *United States v. Rush* that marijuana use is a per se invalid religious exemption.[115] The next step in the RFRA test is the sincerity of an individual's belief,[116] since freedom of belief is the essence of the Free Exercise Clause.[117] Membership in the church or actual testimony can evidence this sincerity. The religion in question must be an actual religion and not merely a philosophy or outlook on life.[118] The Tenth Circuit laid out a test in *United States v.*

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108. *Id.* §§ 2000bb-1(b)(1-2).

109. Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001) (citing Werner v. McCotter, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995)).

110. *See* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1184-85 (10th Cir. 2003).

111. *See id.*

112. *See* United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996).

113. *See* Guam v. Guerrero, 290 F.3d 1210, 1223 (9th Cir. 2002).

114. *Bauer*, 84 F.3d at 1559.

> The government should be free to cross-examine them on whether they, in fact, are Rastifarians and to introduce evidence negating their asserted claims. It is not enough in order to enjoy the protections of the Religious Freedom Restoration Act to claim the name of a religion as a protective cloak.

Id.

115. United States v. Rush, 738 F.2d 497, 512-13 (1st Cir. 1984).

116. Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001) (citing Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir. 1995)).

117. *See* U.S. CONST. amend. I.

118. United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996).

Meyers for determining whether a belief system is a religion for the purposes of RFRA:

1. *Ultimate Ideas*: Religious beliefs often address fundamental questions about life, purpose, and death . . . .
2. *Metaphysical Beliefs*: Religious beliefs often are "metaphysical," that is, they address a reality which transcends the physical and immediately apparent world . . . .
3. *Moral or Ethical System*: Religious beliefs often prescribe a particular manner of acting, or way of life, that is "moral" or "ethical." . . .
4. *Comprehensiveness of Beliefs*: Another hallmark of "religious" ideas is that they are comprehensive . . . .
5. *Accoutrements of Religion*: . . . [E]xternal signs may indicate that a particular set of beliefs is "religious":
    a. Founder, Prophet, or Teacher . . .
    b. Important Writings . . .
    c. Gathering Places . . .
    d. Keepers of Knowledge . . .
    e. Ceremonies and Rituals . . .
    f. Structure or Organization . . .
    g. Holidays . . .
    h. Diet or Fasting . . .
    i. Appearance and Clothing . . .
    j. Propagation.[119]

This list helped the court decide that defendant David Meyers led a lifestyle involving frequent use of marijuana, not a religion where he was the Reverend of the Church of Marijuana as he claimed.[120] However, the *Meyers* dissent properly pointed out that "[t]he ability to define religion is the power to deny the freedom of religion."[121]

Even though there are inherent problems in defining religion, this does not detract from the strength of RFRA in matters of federal law.[122] However, RFRA lost its applicability to the states when the Court decided *City of Boerne v. Flores*.[123] *Flores* found that Congress went beyond its power under Section 5 of the Fourteenth Amendment.[124] The court stated "[l]egislation which alters the meaning of the Free Exercise

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119. *Id.* at 1483-84.

120. *Id.* at 1484.

121. *Id.* at 1489 (Brorby, J., dissenting) (determining religious beliefs is a delicate task that must be done cautiously); Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3rd Cir. 1981) ("Judges are ill-equipped to examine the breadth and content of an avowed religion.").

122. Kikumura v. Hurley, 242 F.3d 950, 959-60 (10th Cir. 2001).

123. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

124. *Id.*

Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."[125] However, *Kikumura v. Hurley* severed the unconstitutional state section of RFRA and held it still applicable to the federal government.[126] The Court went on to state that "Congress' power to apply RFRA to the federal government comes not from its ability to enforce the Fourteenth Amendment but rather from its Article I powers."[127]

RFRA protects more religious activities than the Supreme Court desires, and it may protect more conduct than would a prima facie case that falls under the First Amendment.[128] However, and this is where RFRA's strength lies, this is allowed because RFRA is a valid exercise of congressional power.[129] Courts are split on whether a claim brought under the First Amendment requires a different, relaxed burden of proof than RFRA's more stringent requirements,[130] or whether RFRA embodies the First Amendment Free Exercise Clause.[131]

VI. CONFLICTING INTERNATIONAL AND DOMESTIC LAW

Hoasca is illegal under the Convention and in the United States under the CSA.[132] However, religious freedom is a constitutional right in the United States,[133] and if *hoasca* users can fulfill the requirements of RFRA, they may use that as a defense to the restriction of *hoasca* under the CSA.[134] There is no defense to the violations of the Convention.[135]

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125. *Id.*

126. *Kikumura*, 242 F.3d at 959 (stating that statutes are severable "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'" (citing I.N.S. v. Chadha, 462 U.S. 919, 931-32 (1983))).

127. *Id.*; *see also* Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831-33 (9th Cir. 1999); Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 858-59 (8th Cir. 1998).

128. *See* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877-80 (1990); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(4) (2000).

129. Sasnett v. Dep't of Corrections, 891 F. Supp. 1305, 1321 (W.D. Wis. 1995).

130. *See* Campbell-El v. District of Columbia, 874 F. Supp. 403, 408 (D.D.C. 1994) (holding that there are two separate tests for the First Amendment Free Exercise claim and RFRA); Kikamura v. Hurley, 242 F.3d 950, 961-62 (10th Cir. 2001); Sasnett v. Sullivan, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995); Show v. Patterson, 955 F. Supp. 182, 189 (S.D.N.Y. 1997).

131. *See* Meyer v. Fed. Bureau of Prisons, 929 F. Supp. 10, 14 (D.C. Cir. 1996); Allah v. Menei, 844 F. Supp. 1056, 1062 (E.D. Pa. 1994); Keeler v. Mayor & City Council of Cumberland, 928 F. Supp. 591, 600 (D. Md. 1996).

132. *See* Convention, *supra* note 5; Controlled Substances Act, 21 U.S.C. § 812 (2000).

133. *See* U.S. CONST. amend. I.

134. *See* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1187 (10th Cir. 2003).

135. *See* Convention, *supra* note 5.

A. Primacy of Individual Rights

When a treaty and a domestic constitution conflict, the domestic constitution rightly wins.[136] In the United States, although a treaty is the supreme law of the land, it cannot supercede the provisions of the Constitution.[137] When a treaty and a statute conflict, the Supreme Court holds "'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'"[138] Treaties are contracts between two or more nations, and if they are not self-executing (the Convention) then the treaty only becomes effective in the domestic arena through legislative implementation (the CSA).[139]

The United States Supreme Court consistently upholds the primacy of individual rights in the Constitution over international agreements.[140] One scholar has noted that "[t]here is perhaps no element of the foreign relations law canon more universally held than the proposition that constitutional rights prevail as against inconsistent international agreements; . . . the Constitution stands supreme."[141] International relations are in the control of the executive branch.[142] Otherwise, the President and a majority of the Senate could nullify the rights granted in the Constitution by signing a treaty.[143]

Applied to the *hoasca* situation, RFRA's protection of the First Amendment right to religious freedom trumps the Convention's requirement that the United States outlaw *hoasca*.[144] Even when applying the test of RFRA, the government's need to follow the Convention is not

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136. Breard v. Greene, 523 U.S. 371, 376 (1998).

137. *Id.*

138. *Id.* (citing Reid v. Covert, 354 U.S. 1, 18 (1957)).

139. *See, e.g.*, Convention, *supra* note 5; 21 U.S.C. § 812 (2000).

140. Maier, *supra* note 13, at 1212; *see e.g.*, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (noting that the United States' power to make treaties does not extend "so far as to authorize what the Constitution forbids") (internal citations omitted); De Lima v. Bidwell, 182 U.S. 1, 195 (1901) (stating that "a treaty is placed on the same footing, and made of like obligation, with an act of legislation" and is thus subordinate to the Constitution) (internal citations omitted); PAUST, *supra* note 13, at 81 ("[O]ur courts will apply the Constitution domestically even though such action places the United States in violation of international law at the international level.").

141. Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 1999-2000 (2003).

142. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 314 F.3d 463, 467 (10th Cir. 2002) ("We are reluctant to second guess the executive regarding the conduct of international affairs.").

143. Reid v. Covert, 354 U.S. 1, 17 (1957).

144. *See* PAUST, *supra* note 13, at 81.

considered a compelling governmental interest.[145] Even assuming that it was compelling, there are less restrictive means of complying with the Convention, such as attempting to amend the Convention to allow for *hoasca* use.[146]

B. No World View on Domestic Law

International law suffers not only because it is subrogated to domestic law, but also because there is a lack of worldwide consensus on the treatment of domestic laws.[147] For example, there is no world view on drafting domestic drug laws.[148] Certain populations, especially indigenous populations, do not view drug use in the same manner as the Western industrialized world.[149] States in the Western industrialized world differ in their views on drug production and use.[150] There is a lack of consensus, and it seems counterintuitive then that nations would draft one treaty prohibiting lists of substances.[151] The basis for passing a law must be an agreement on basic principles, and yet the diverse views on drugs lead to the conclusion that if states are going to sign international laws on drugs like the Convention, they must be motivated by another concern, perhaps the underdeveloped states' need for money in the form of loans.[152]

Consider the differing views on coca, the plant from which cocaine is the derivative, between the countries in South America and North America. Coca is the "sacred leaf of the Andean people."[153] The poor grow it in South America because it is the most economically attractive crop; it requires little technology to grow in extremely underdeveloped areas; and crop substitution programs have failed from either the lack of research or the diversion of funds from the government.[154] The United States' supply-side international war on coca producers has only made

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145. *See O Centro Espirita*, 342 F.3d at 1185.

146. Convention, *supra* note 5, art. 30.

147. *See* Cathryn L. Blaine, *Supreme Court "Just Says No" to Medical Marijuana: A Look at* United States v. Oakland Cannabis Buyers' Cooperative, 39 HOUS. L. REV. 1195, 1229 (2002) (noting that Belgium, Luxembourg, and Portugal are in the process of decriminalizing marijuana; that the United Kingdom is reclassifying marijuana so that mere possession is not an arrestable offense, and that France and Canada are debating decriminalization).

148. *See id.*

149. *See* Santos, *supra* note 53, at 131; *O Centro Espirita*, 342 F.3d at 1174.

150. Blaine, *supra* note 147, at 1229.

151. *See id.*; Convention, *supra* note 5.

152. Santos, *supra* note 53, at 131. Congress amended the Foreign Assistance Act in 1986 to allow the United States to suspend economic aid to states not cooperating in the international war on drugs. *Id.*

153. *Id.* at 131 n.15.

154. *Id.* at 144-45.

the drug trade in Central America and South America more lucrative and violent.[155] Their view on its use is so vastly different from the Western developed world that Bolivia completely reserved out of the 1988 Convention all sections that made coca possession a criminal offense.[156] This is not to say that reservations are the solution to enacting effective international law; reservations merely reflect the differences between autonomous states in how strongly they consider their own domestic laws when ratifying treaties.

The 1971 United Nations Convention on Psychotropic Substances fails to reflect the sincere views many of its signatory States have on respecting their own domestic laws as superior to international law.[157] This is reflected in the reservations allowed when each state signs the treaty.[158] It is also reflected by the frequency with which signatory States violate the Convention. When ratifying the Convention, Canada wrote its own reservation, recognizing that the Convention exempts "certain psychotropic substances of plant origin" which grow in North America, but not Canada, for use by "small clearly determined groups who use [them] in magical or religious rites."[159] Although *hoasca* does not grow in North America, it is used in religious rites, and Canadian courts have been extremely lenient on offenders.[160] The Controlled Drugs and Substances Act, the Canadian law enacting the Convention, lists DMT lower, in Schedule III.[161] The punishment for possession of a Schedule III drug is very lenient, with statutory maximums of three years imprisonment or a fine of one thousand dollars and maximum six months imprisonment for first time offenders.[162] In a recent case, the Ontario Court of Justice sentenced Juan Uyankar to only one year of house arrest for the offenses of "administering a noxious substance" and "trafficking in a banned substance" after facilitating the death of an elderly woman during a *hoasca* healing on a First Nations Native American reserve.[163]

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155. John Barry, *From Drug War to Dirty War: Plan Colombia and the U.S. Role in the Human Rights Violations in Colombia*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 161, 170-71 (2002).

156. MULTILATERAL TREATIES, *supra* note 21, at 412-13.

157. Convention, *supra* note 5.

158. *Id.* art. 32.

159. MULTILATERAL TREATIES, *supra* note 21, at 396.

160. Logan, *supra* note 14.

161. Controlled Drugs and Substances Act, S.C., ch. 19, sched. III (1996) (Can.).

162. Controlled Drugs and Substances Act, S.C., ch. 19, § 4(6) (1996) (Can.).

163. Logan, *supra* note 14.

Brazil made the maximum number of reservations to the Convention.[164] By making these reservations, they refuse to appear before the United Nations Narcotic Control Board for perceived international violations of the Convention, refuse to extend the Convention to all territories under Brazilian control, and refuse to submit to the jurisdiction of the International Court of Justice.[165] Brazil has violated the Convention by legalizing *hoasca* use for group religious ceremonies.[166] Brazilian drug law, overseen by the Secretaria Nacional Antidrogas (SENAD),[167] is leading the South American continent in relaxing criminal punishment for drug offenses and focusing on rehabilitation instead of incarceration for recreational drug users.[168] Most revealing, the Brazilian Constitution proclaims that "freedom of conscience and belief is inviolable, assuring free exercise of religious beliefs and guaranteeing, as set forth in the law, the protection of places of worship and their rites."[169]

The Netherlands not only signed the Convention in full, it also extended the Convention to the Netherlands Antilles in 1999, indicating that the Netherlands respects the Convention as valid and modern international law.[170] However, the Netherlands courts recently held that their obligations under the Convention are secondary to domestic laws guaranteeing religious freedom.[171] In *Netherlands v. Fijneman*, an Amsterdam District Court dismissed charges against Geerdine Fijneman, a member of the Santo Daime religion, for violating the Opium Act, the Dutch law enacting the Convention, and also found that ingestion of *hoasca* by Santo Daimes posed no appreciable risks to public health.[172]

> Furthermore, in this case the interest of the defendant, namely that no infringement should be made of her right to religious freedom . . . , must be weighed against the interest of the State, namely that it must fulfill its duty to prohibit DMT, a duty arising from the Convention on Psychotropic

164. *See* Convention, *supra* note 5, art. 32(2); MULTILATERAL TREATIES, *supra* note 21, at 396.

165. *See* MULTILATERAL TREATIES, *supra* note 21, at 396.

166. McKenna et al., *supra* note 28, at 65-66; *see* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1174 (10th Cir. 2003) (noting that *hoasca* use is legal in Brazil).

167. *See* Secretaria Nacional Antidrogas (SENAD), *at* http://www.senad.gov.br/ingles/conad.htm (last visited Feb. 7, 2004).

168. Andrew Downie, *Brazil's Drug Users Will Get Help, Instead of Jail*, CHRISTIAN SCI. MONITOR, Jan. 4, 2002, *available at* http://www.csmonitor.com/2002/0104/p7s2-woam.html.

169. BRAZ. CONST., tit. II, ch. I, art. 5(VI) (1996).

170. *See* MULTILATERAL TREATIES, *supra* note 21, at 396-400.

171. Netherlands/Fijneman, District Court, Amsterdam, May 21, 2001, Case #NJ13/067455-99, *available at* http://www.drugtext.org/library/legal/ayahuascaverdict.htm.

172. *Id.*

> Substances. Considering the weight which must be attached to religious freedom and the circumstance that, as was considered above, there are no appreciable health risks involved in the ritual use of ayahuasca, the Court is of the opinion that in this case the greater weight should be attached to the protection of religious freedom. The conclusion is that in this case Section 2 of the Opium Act should not apply.[173]

Even though the Dutch court acknowledged its obligation to follow the Convention as implemented through the Opium Act, it ignored both domestic law and the Convention in favor of religious freedom.[174]

VII. *O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL V. ASHCROFT*

The Tenth Circuit decided in *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft* that the constitutional right to freedom of religion embodied in RFRA outweighs the government's interest in following the Convention.[175] This results in the United States disregarding the Convention, just like a number of signatories, and following loosely in the Netherlands' footsteps.[176] In 1999, United States Customs Agents seized a shipment of *hoasca*, labeled "tea extract," bound for a UDV member in the United States.[177] The shipment prompted a search of the member's home, where the government seized thirty gallons of *hoasca*.[178] There were no criminal charges filed against the UDV member; however, the UDV filed a complaint for declaratory and injunctive relief and a motion for preliminary injunction against the U.S. government.[179] The UDV member eventually won, claiming, among other charges, a violation of RFRA.[180] The majority disregarded the dissenting opinion, which argued that extending constitutional protection of rights to the UDV would violate the Convention and undermine the United States' legitimacy in the international War on Drugs.[181] This illustrates that the international War on Drugs must be on very tenuous grounds if it can be undermined by the upholding of constitutional rights.

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173. *Id.*

174. *Id.*

175. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1187 (10th Cir. 2003) (affirming a preliminary injunction to allow *hoasca* use under the Religious Freedom Restoration Act).

176. *See id.*; Netherlands/Fijneman, District Court, Amsterdam, May 21, 2001, Case # NJ13/067455-99, *available at* http://www.drugtext.org/library/legal/ayahuascaverdict.htm.

177. *O Centro Espirita*, 342 F.3d at 1175.

178. *Id.*

179. *Id.* at 1172-73.

180. *Id.* at 1172-73, 1187.

181. *See id.* at 1192 (Murphy, J., dissenting).

In another case involving the *hoasca* controversy, a U.S. court will be forced to examine the "sincerity of beliefs" requirement under RFRA.[182] Alan Thomas Shoemaker faces trial, in the Northern District of Georgia, for importing *hoasca* and the plants necessary to brew the concoction.[183] Shoemaker faces up to twenty years in federal prison for drug importation and possession.[184] He moved to Peru ten years ago to study native medicines and religions, shipped three crates of plants to his son, and then was arrested while visiting the United States.[185] His case raises a difficult, yet tangential point on the danger of religious conversion. Shoemaker calls himself "forever a student" of his faith.[186] His belief appears real, but the sincerity of his religion, for which RFRA tests, would be on much weaker grounds if he had just joined the *hoasca* movement, recently moved to South America, or lived in the United States and imported the plants.[187] The enumerated list fashioned by the court in *United States v. Meyers* to test the strength of religious systems may seem offensive, but the court must somehow prevent a slippery slope of defendants converting to a religion merely for drug use.[188] RFRA protected use of peyote by Native Americans is an exception to this situation, as the Native American religion is not a faith of conversion, despite the many legal exemptions for members of the tribes.[189]

VIII. THE INTERNATIONAL WAR ON DRUGS

When signatory states such as Canada, Brazil, the Netherlands, and the United States do not enforce the Convention, it weakens the legitimacy of the international War on Drugs. Disregarding the Convention because it conflicts with domestic law reveals the weakness of the international law system, which in this example supports the War on Drugs. One could surmise that the political effect of disregarding the Convention puts the States in a position to be called before the United

182. Bill Rankin, *Man in Legal Wrangle Over Hallucinogenic Tea*, SEATTLE POST-INTELLIGENCER, Oct. 14, 2002, *available at* http://www.seattlepi.nwsource.com/national/919091_drug14.shtml.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.*

188. *See id.*; United States v. Hardman, 297 F.3d 1116, 1118-20 (10th Cir. 2002) (noting that two defendants are both closely connected to Native American tribes, but neither exempted as a Native American).

189. *Hardman*, 297 F.3d at 1118-20 (noting that two defendants are both closely connected to Native American tribes, but neither exempted as a Native American).

Nations International Narcotics Control Board for an examination.[190] When States are called before the United Nations for disobeying their international obligations, it weakens the appearance of domestic authority. Most surprising is that signatory States have had the opportunity to either propose an amendment or denounce the Convention.[191] Instead, they have chosen to ignore it.[192]

Disobeying an international law because of domestic laws undermines the United States' push to unite the world in the fight against drugs. The United States spearheaded the War on Drugs,[193] and now it is violating one of its major tenets.[194] There are only three major international treaties controlling drug trafficking: the 1961 United Nations Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[195] During the early 1980s, the United States began its international War on Drugs through coordination with other governments: coca plant control programs with Bolivia and Peru, poppy control programs with Pakistan, opium eradication programs with Burma, and spraying marijuana fields in Colombia.[196]

The political power that the United States wields over the rest of the world is inextricably tied in with development money, because the actual struggle against narcotic trafficking is perceived to be lost. Domestically, many Americans claim that their own government has lost the War on Drugs: nine progressive states have passed voter initiative medicinal marijuana statutes.[197] Judge James P. Gray writes:

> The papers are full of stories of an innocent bystander or a police officer being injured or killed during a shootout with drug dealers; of overdoses caused by the unknown strength or purity of a drug; of the corruption of people in this country and others because of the enormous profits to be

190. Convention, *supra* note 5, art. 19(a). Brazil, under reservation, is exempted from being called before the International Narcotics Control Board. MULTILATERAL TREATIES, *supra* note 21, at 396.

191. Convention, *supra* note 5, arts. 29-30.

192. *See* MULTILATERAL TREATIES, *supra* note 21, at 395-99.

193. Steven Plitt, *The Changing Face of Global Terrorism and a New Look of War: An Analysis of the War-Risk Exclusion in the Wake of the Anniversary of September 11, and Beyond*, 39 WILLAMETTE L. REV. 31, 77 n.359 (2003) President Reagan declared a War on Drugs in his Radio Address to the Nation on Federal Drug Policy, Oct. 2, 1982. *Id.*

194. *See* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1187 (10th Cir. 2003).

195. Summary of Remarks by Herbert S. Okun, *supra* note 19, at 195.

196. Plitt, *supra* note 193, at 78.

197. Blaine, *supra* note 147, at 1214 (currently California, Alaska, Arizona, Colorado, Nevada, Oregon, Washington, Maine, and Hawaii have such laws).

> made by the selling of illicit drugs; and of the cutting back of hours or outright closing of a county library because of increased spending for prisons and the other necessities of the War on Drugs.[198]

The American population consumes a lion's share of the world's illegal drugs; for example, Americans consume more cannabis, cocaine, ecstasy, volatile substances, and heroin percentage-wise than the Dutch.[199] The war is perceived to be lost internationally: in 1997, the UN's International Narcotics Control Board called for states to criminalize any opposition to the War on Drugs—but not a single state followed it.[200]

The United States' certification process to determine aid to foreign states truly undermines its credibility in the War on Drugs. Every year the President must certify whether major drug producing and trafficking states are cooperating with United States' anti-drug policy by eradicating enough crops, arresting enough drug traffickers and growers, and enforcing their own domestic drug laws.[201] If the states do not adequately comply with the American agenda for the War on Drugs, the United States sanctions them by withdrawing aid unrelated to narcotics programs, imposing trade sanctions, and opposing multilateral development loans from the World Bank.[202] The certification process pressures underdeveloped Central and South American nations to pass antidrug laws to comply with the American War on Drugs because they need development loans.[203] Domestically, many Americans oppose the certification process; in 1997 the Senate backed by top Clinton administration officials almost approved suspending the certification process for two years.[204]

The United States' credibility is further weakened by the emergence of the damaging social and economic effects on the world from the War on Drugs. Abroad, the United States' War on Drugs has, in the words of one victim, "brought nothing but poverty and death."[205] Bolivia passed

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198. JUDGE JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 13 (2001).

199. THE NETHERLANDS MINISTRY OF FOREIGN AFFAIRS, Q & A DRUGS-2003: A GUIDE TO DUTCH POLICY ANNEX III-V 20-22 (2003), *available at* http://www.minbuza.nl/default.asp?CMS_TCP=tAsset&id=175A6D3F70164607A386D43B61DC135FX2X42819X14.

200. International Narcotics Control Board Releases Report Updating Illicit Drug Situation Worldwide, U.N. Info. Serv., U.N. Doc. UNIS/NAR/599 (1997), *available at* http://www.unodc.org/unodc/en/press_release_1997-02-15_1.html?print=yes.

201. Santos, *supra* note 53, at 132.

202. *Id.*

203. *Id.*

204. *Id.* at 133.

205. Leonida Zurita Vargas, *Stop America's War on Bolivian Farmers*, INT'L HERALD TRIB., Oct. 16, 2003, *available at* http://coranet.radicalparty.org/pressreview/print_250.php?func=detail&par=6982 (last visited Feb. 7, 2004).

Law 1008 to comply with U.S. demands, creating a separate justice system for narcotics offenders.[206] Critics have claimed Law 1008 as unconstitutional because it presumes the guilt of offenders, violates other international human rights laws, discriminates against the poor, and threatens national sovereignty and cultural traditions.[207] This law must be underscored as a blow to the Bolivian right of autonomy because of the United States' instrumental role in its drafting and enforcement; Law 1008 is thus referred to as the "Law of Foreigners."[208] Socially, Bolivian women and children suffer most from the War on Drugs. It has been reported that government troops funded with American money beat and rape the poor when they discover them growing coca in the countryside.[209] Women and children suffer from mandatory incarceration laws in Central America because when poor parents are sent to prison for drug trafficking, they may have to take their children with them.[210] At the beginning of 1998, around 2200 children lived in Bolivian prisons with their families.[211]

Socially, the poor of Central and South America are hardest hit by the United States' War on Drugs.[212] The War on Drugs further exacerbated civil violence in Colombia between guerillas and the government, adding a new group of drug sponsored fighters (the paramilitary) to make Colombia arguably the most dangerous place in the Western Hemisphere, with a 1350% increase in the homicide rate between 1980 and 1995 for males aged fourteen to forty-four years.[213] Despite U.S.-led lawmaking endeavors and strong American influence over every aspect of their governments, "what may be most remarkable about these various lawmaking endeavors is their negligible impact on drug-smuggling throughout the region."[214] The criminal justice systems of Central American countries sought to comply with demands from the United States in structuring laws; however, the deterrent aspect of

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206. Santos, *supra* note 53, at 134-35.

207. *Id.* at 136-38.

208. *Id.* at 138.

209. *Id.* at 140-41. The United States funded security assistance to the Andean region with $1.3 billion in 2000-2001, and funded the Drug Interdiction and Counter-Drug Activities, which gave Bolivia $25 million for their drug police/military in 2000. *Id.* at 133-34.

210. *Id.* at 142-43.

211. *Id.* at 143.

212. *See id.* at 137-38.

213. Barry, *supra* note 155, at 175-76 (citing ANGEL RABASA & PETER CHALK, COLOMBIAN LABYRINTH: THE SYNERGY OF DRUGS AND INSURGENCY AND ITS IMPLICATIONS FOR REGIONAL STABILITY 6 (2001)).

214. Michael Ross Fowler & Julie Marie Bunck, *Narcotics Trafficking, Central American Prisons, and the Law*, 25 SUFFOLK TRANSNAT'L L. REV. 433, 445 (2002).

punishing drug smugglers failed.[215] Jails are overcrowded, and the poor are disproportionately abused and discriminated against as a result of America's War on Drugs.[216] The War on Drugs also destroys the environment: growing and producing narcotics clears land and dumps chemicals, pesticides, and eradication pollutants all over the countryside.[217] "The failure of America's 'War on Drugs' is often simply ascribed to inexorable problems of supply and demand."[218]

IX. IS FUNCTIONAL INTERNATIONAL LAW IMPOSSIBLE?

In light of the Convention's failure and the conflict with domestic law revealing America's floundering in the international War on Drugs, does functional international law seem possible? Creating the 1971 United Nations Convention on Psychotropic Substances was one process; ensuring that the signatory States comply with it seems to be a separate and impossible process. If it is simply ignored, further attempts at drafting international laws will have to learn from mistakes made this time around. Because domestic law and constitutional protections stand up to international agreements, and because there is a lack of a consensus on how nations should respect their own domestic laws, international law appears ultimately to fail.

The United States does not respect the domestic laws of Central and South America as revealed by its manipulation of autonomous nations in the War on Drugs, yet will uphold its own laws in the face of a Convention as revealed by the *hoasca* example. International agreements should include specific provisions that give due regard for each autonomous state's laws instead of hoping that, because a state has its own constitution, it will respect another state's constitution. Ideally, this forces drafters to focus on their main objectives, keeping the agreements pertinent and keeping states compliant because of their flexibility. However, what would an agreement that deferred to constitutions really look like? It most likely would fail to be an international law; instead it might just look like a nonbinding set of guidelines. Fluidity aids international law as long as it still binds the signatory States. Deference to constitutions may be a good place to start to prevent further disregard for international law.

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215. *Id.* at 445-48.

216. *Id.*

217. William Moorhouse, *The National Environmental Policy Act, U.S. Counter-Narcotic Policies in Colombia, and Whether Recent Aid Should Require an Environmental Impact Statement*, 26 SUFFOLK TRANSNAT'L L. REV. 133, 137 (2002).

218. Fowler & Bunck, *supra* note 214, at 479.

X. CONCLUSION

The conflict between domestic law and international law makes functional international law seem impossible, but the solution could be to draft international laws that defer to autonomous state constitutional protections. The *hoasca* example facilitated a discussion of what happens when domestic law conflicts with international law. In the United States, the domestic RFRA conflicted with the domestic CSA, but the Court enforced RFRA over the CSA because the government failed to prove that a compelling government interest was advanced using the least restrictive means.[219] That still left RFRA and the Convention in conflict. It also undermined the United States' legitimacy in an already highly criticized War on Drugs. The domestic law superceded the international law because it upheld a constitutional provision, freedom of religion. If every State had the same constitutional provisions, drafting international law would be easy. However, recognizing that states assign different values to their domestic laws reveals the problem of drafting and enforcing compliance with international law.

219. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1187 (10th Cir. 2003).